UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION ONE

In The Matter Of: BAY STATE DRYWALL COMPANY, INC., Employer and NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, Petitioner	01-RC-129480

PETITIONER'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS TO HEARING OFFICER REPORT

Thomas R. Landry, Esq.
Krakow & Souris, LLC
225 Friend Street
Boston, MA 02114
(617) 723-8440
tlandry@krakowsouris.com

Counsel for Petitioner, New England Regional Council of Carpenters

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I. INTRODUCTION

Here comes Petitioner New England Regional Council of Carpenters ("Petitioner" or, in the alternative, the "Council") in opposition to Respondent Bay State Drywall, Inc.'s ("Employer") exceptions to the Hearing Officer's Report and Recommendations on Objections. The Employer excepts to sixteen (16) of the Hearing Officer's findings and/or conclusions of law in an effort to undermine her conclusion that the Employer failed to meet its burden of establishing an "overwhelming community of interest" between tapers and carpenters. *See, e.g., Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, *12-13 (2011) enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). In short, the exceptions lack any substantive merit. The Employer fails to establish that any finding was not supported by substantial evidence, any credibility determination was against the clear preponderance of the evidence and any conclusion was legal error. As such, the Board should overrule the exceptions and adopt the Recommendations of the Hearing Officer. In the event that any Exception or Objection is sustained and sufficient to set aside the election, the case should be remanded to resolve any dispositive factual dispute.

II. FACTS

A. **Bay State Drywall**

The Employer is a commercial drywall and exterior wall construction subcontractor. Tr. 241. The company has approximately 5-6 jobs occurring at one time. Tr. 172. The organizational structure of the company is rather simple. The company is owned by Joe Soares and Manny Sousa. Tr. 245. Mr. Soares' son, Jason, is the vice

president and project manager for the Employer. Tr. 239. Directly below Jason Soares is the road supervisor, Russ Desmarais. Tr. 245-46. As the road supervisor, Mr. Demsarais is in charge of all the workers in the field. Tr. 165. The Employer employs working foreman on each project. Tr. 246. All of the working foremen work as carpenters. Tr. 246. Below the foreman are the field employees – carpenters, tapers and EIFS installers. Tr. 188.

B. The Skilled Craftworkers at Bay State Drywall

The Employer employs field employees within the following three (3) classifications: carpenters, tapers and EIFS installers. Tr. 188. The Employer has separate postings for carpenters and tapers. Tr. 277-78; Pet. Exh. 8. When the Employer wants to hire a new carpenter, it publishes a posting which specifically calls for applicants who are interested in working as carpenters. When the Employer wants to hire a new taper, it publishes a posting which specifically asks for applicants who are interested in working as tapers. Tr. 198, 277-78.

Each of the classifications is composed of highly skilled employees. Tr. 189. The primary form of training received by the Employer's employees is on-the-job. Tr. 189. Specifically, newer carpenters will work and train with more experienced carpenters. Tr. 189-90. Similarly, new tapers will work and train with more experienced tapers. Tr. 190. From time to time, specialized training will occur. For example, the Employer recently provided lull[1] training for carpenters, not tapers. Tr. 141-42.

[1] A "lull" is a machine, similar to a forklift, that can lift heavy materials onto the higher levels of a job. Tr. 141.

There are approximately twenty-two (22) carpenters employed by the Employer. Tr. 188, 218. Each of these carpenters typically performs carpentry work. Id. Each of the carpenters has similar duties, responsibilities, benefits, supervision, and tools. Tr. 218-19.

Likewise, the five (5) tapers employed by Bay State typically perform taping work. Tr. 188. As the Employer's road supervisor stated, "[i]f they're tapers, they're taping."[2] Tr. 213. When there are multiple tapers on a job, one of the tapers will supervise the other tapers. Tr. 219.

1. The Work of the Carpenter at Bay State Drywall

The work, skills and tools necessary to perform carpentry and taping work for the Employer are distinctly different. The beginning of every project for Bay State Drywall involves the carpenters, not the tapers, going to the job site to begin work. Tr. 134. Specifically, and as it relates to the construction of exterior walls, at Bay State Drywall carpenters layout and install the bottom and top track. Tr. 247. After this, the carpenters install the metal studs between the top and bottom tracks. Id. Part of this process includes the placement of windows, jambs and sills – which is also performed by carpenters at Bay State Drywall. Tr. 247. The next step would be to install the exterior sheeting, which creates an enclosure around the outside of the building. Id. Vapor barriers are then typically installed by either the carpenter or the EIFS installer. Tr. 250. Tapers would not be involved in the performance of any of the above work. Tr. 251.

[2] The same is true for EIFS installers; they "do not normally [perform] carpentry" work. Tr. 208.

Once the exterior is finished, the Employer will move to the inside of the building to construct the interior walls. Tr. 251. Framing of the interior walls is virtually identical to the process of framing exterior walls – and is also performed by the company's carpenters. Tr. 120-21; 251-52. Once the interior walls are framed, other trades come will come in to install electrical, plumbing or other types of fixtures within the wall. Tr. 121, 252. Once the electrical and plumbing trades have completed their work on the wall, the carpenters will install wood blocking, frame the soffits and ceilings, install gypsum wallboard (i.e., "hang the drywall") and insulation, and then close-up the wall with the second layer of gypsum wallboard.[3] Tr. 121-22, 252-53.

2. The Work of the Taper at Bay State Drywall

Once the wall is made, the tapers are called-in to start work. Tr. 254. The tapers perform the fire taping and fire caulking of the walls, install the safing insulation at the top of the wall, prepare and finish the wall by applying drywall tape and three coats of joint compound, and finally sand the wall to create a smooth surface ready to be painted. Tr. 122-23, 255-56. If imperfections are noted after a painter applies a first coat of primer to the completed wall, a taper will be called back to fix the problem. Tr. 124.

Of the Employer's total work hours, the vast majority are carpenter work hours. Tr. 215. The five tapers perform a relatively small fraction of the overall work in terms of hours. Tr. 215.

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[3] Tapers will often perform the less-intricate "corner-bead" work – leaving the more difficult corner-bead installation to be done by carpenters. Tr. 146-47. The amount of time a carpenter spends installing corner-bead is very small – perhaps two-percent of the overall work. Tr. 147.

3. The Tools of the Carpenter

In order to perform their duties, carpenters at Bay State Drywall carry, and are required to maintain their own, screws, hammer, knife, keyhole saw, chalk line, clamps, pencils and tape measure, along with tool pouch to carry the tools in. Tr. 119-20. Carpenters at Bay State also frequently use screw guns, lasers, chop saws, skill saws, hammer drills, cutoff saws, "sawzalls", hilti guns, and other power tools. Tr. 119-21. In order to operate a hilti gun, a worker must have a special license. Tr. 163-64. Carpenters, not tapers, working for the Employer hold these licenses. Tr. 164. The Employer provides carpenters with access to power tools when necessary. Tr. 120.

4. The Tools of the Taper

Tapers at Bay State Drywall work with a "hawk", a six-inch knife, and trowels. Tr. 125-26. Tapers do not use a tool pouch like the carpenters do. Tr. 126. Occasionally, a taper will where an apron to keep their gloves or knife inside. Tr. 127.

5. The Lack of Interchange Between Carpenters and Tapers

When a taper is out sick, s/he will be replaced by another taper. Tr. 279; Pet. Exh. 9. When a carpenter is out sick, s/he will be replaced by another carpenter. Tr. 279. The Employer will occasionally have tapers perform other duties in order having to avoid laying them off. Tr. 187, 202. However, when work is not available for tapers, the Employer will lay off a taper – even if the taper has more seniority with the company than carpenters who are currently working. Tr. 202-03. When tapers perform these other duties, it is generally less-skilled carpentry work – or simply laborer work, like sweeping or cleaning-up. Tr. 187.

There is no history at the company of tapers becoming carpenters or carpenters becoming tapers. Tr. 222.

6. The Differences in Pay Between Carpenters and Tapers

While the benefits of Bay State employees are generally similar, carpenters and tapers with similar hire dates do not make the same hourly wages. For example, Joaquim Montero, a carpenter, was hired approximately three (3) months prior to Joseph Amaral, a taper. Tr. 195; Pet. Ex. 5. **Despite the proximity of their dates of hire, Mr. Montero makes $2.75 per hour more than Mr. Amaral.** Tr. 196; Pet. Ex. 5. Another taper, David Camara, was hired approximately two (2) weeks **before** Mr. Montero, yet he makes **$2.25 less** than Mr. Montero. Tr. 196-97; Pet. Ex. 5.

Both the Commonwealth of Massachusetts and the federal government also acknowledge the distinction between carpenters and tapers within their respective prevailing wage rates and classifications. Pet. Ex. 3 & 4; Tr. 75-77. Both entities recognize "carpenters" and "painter/tapers" or "tapers" to be separate classifications requiring differing rates of pay and benefits under the respective prevailing wage laws. Id.

7. The Lengthy (and Separate) Bargaining Histories of Carpenters and Tapers within New England.

Both the Carpenters' Union representative, Mr. DeCosta,[4] and the representative from the Painters' Union, Mr. Hernandez,[5] testified to the clear trade demarcations that exist throughout the New England area. Tr. 10, 16, 72; Pet. Ex. 1; Joint Ex. 1. Both Mr.

[4] Mr. DeCosta is currently a Regional Manager for the New England Regional Council of Carpenters.

[5] Mr. Hernandez is currently a Business Representative/Organizer for District Council 35 of the International Union of Painters & Allied Trades. Tr. 8-9.

DeCosta and Mr. Hernandez testified that tapers have always been represented by the Painters' Union throughout New England. Tr. 16, 72. Mr. DeCosta confirmed this and testified that throughout his entire history with the Carpenters' Union (both as an organizer and Regional Manager), he has never attempted to organize tapers during any prior drywall organizing campaign. Tr. 69. Both Mr. Hernandez and Mr. DeCosta listed-off multiple drywall companies in New England that employ carpenters represented by the Carpenters' Union and tapers represented by the Painters' Union. Tr. 55-56, 66-67.

Mr. Hernandez also explained that, in addition to their long history of representing the interests of tapers throughout New England, the Painters' Union maintains apprenticeship and training classes for tapers through its Finishing Trades Institute. Tr. 17, 20-23; Pet. Ex. 2. Mr. DeCosta candidly acknowledged that the Carpenters' Union in New England does not represent any tapers. Not surprisingly, the Carpenters' training program, the New England Carpenters Training Fund, offers no training for tapers. Tr. 72. Mr. DeCosta worried that if he ever represented tapers at the Employer that were laid off, he would not be able to send them to any other signatory employers for work. Tr. 70.

Finally, both Mr. Hernandez and Mr. DeCosta recognized the overall benefits of continuing to have separate unions represent separate crafts. Tr. 86. By maintaining these distinctions, employees are more skilled (and therefore more productive) and there is less likelihood of labor disharmony on job sites. Tr. 31, 86-88.

C. Alexander Sousa

The Employer is a closely-held corporation owned by two, fifty-percent shareholders, Jose Soares and Manuel A. Sousa. Tr. 113, 225. Manuel Sousa also serves

as the president and director of the Employer. Pet. 7. Manny Sousa's son, Alexander Sousa, is employed by the company as a carpenter. Tr. 112. Alexander currently lives with his father and receives free room and board. Tr. 112-13; 280. Additionally, and unlike other carpenters employed by the Employer, Alexander is given access to a company vehicle for work and personal use. Tr. 281.

D. The Petitioned-For Unit and the Election

Petitioner sought a unit of all full-time and regular part-time carpenters, apprentice carpenters, and working carpenter foremen employed by Employer, but excluding all other employees, EIFS installers, office clerical employees, professional employees, guards and supervisors defined by the Act. The Employer sought to include tapers as part of the bargaining unit. Petitioner and the Employer agreed that tapers would vote in the election subject to challenge.

A representation election was held on July 10, 2014. The Board challenged the ballots of the five (5) tapers and the Union challenged the ballot of Alexander Sousa, on the grounds that he was the son of one of the owners of the Employer. The tally of ballots at the election was, in relevant part, as follows:

Votes cast for Petitioner	10
Votes cast against Petitioner	8
Challenged Ballots	6

The matter came before Lisa Fierce, Hearing Officer, for testimony and evidentiary submissions on August 5 and 11, 2014. The two issues for consideration are: (1) whether the petitioned-for unit constitutes an appropriate unit for bargaining; and (2) whether the special status granted Alexander Sousa, a carpenter and son of one of the two

owners of the Employer, removes him from the definition of "employee" under the Act or otherwise removes him from the community of interest maintained by the other carpenters.

III. ARGUMENT

A. The Hearing Officer Correctly Determined that the Employer Failed to Meet its Burden of Demonstrating that the Tapers Possess an "Overwhelming Community of Interest" with the Carpenters Sufficient to Disturb an Otherwise Appropriate Unit.[6]

The Board has long held that units in the construction industry may be appropriate on the basis of either a craft unit or departmental unit, or so long as the requested employees are a clearly identifiable and homogeneous group who maintain a community of interest with one another. *See, e.g., Brown & Root Braun*, 310 NLRB 632, 635 (1993); *Dick Kelchner Excavating Co.,* 236 NLRB 1414 (1978); *R.B. Butler Inc., supra* at 1598-1599 (1966) and cases cited therein. In making unit determinations, primary consideration is given to the unit requested within the union's petition and whether that unit is appropriate. *P.J. Dick Contracting*, 290 NLRB 150 (1988). The petitioner is not compelled to seek any particular appropriate unit. The Board's declared policy is to

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[6] Within its Exceptions, the Employer does not appear to challenge the Hearing Officer's conclusion "that the petitioned-for unit of carpenters, apprentice carpenters, and working foremen is appropriate." Hearing Officer's Report and Recommendation on Challenged Ballots ("R&R"), at 8 (¶2). The Hearing Officer's rationale for this conclusion – that the petitioned-for group is "readily identifiable as a group, in that they share common duties, skills, training, supervision, hours, pay, and other working conditions, and have frequent contact with one another – is consistent with Board precedent and supported by the record. Tr. 75-77, 119-21, 134, 141-42, 163-64, 188-90, 218-19, 222, 247, 250-53, 279; Pet. Ex. 3 & 4; s*ee, e.g., Overnite Transportation Company*, 322 NLRB 723, 724 (1996); *Esco Corp.*, 298 NLRB 837, 839 (1990); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

consider only whether the unit requested is ***an*** appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964).

A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless "an appropriate unit compatible with that requested unit does not exist." *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963); *accord Ballentine Packing Co.*, 132 NLRB 923, 925 (1961). If the Board finds that the unit sought by the petitioner is an appropriate unit, its inquiry ends. *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). Accordingly, while a comprehensive unit of all field construction employees may also be an appropriate unit (or perhaps even a more appropriate unit), it is only necessary to decide whether the petitioned-for unit of carpenters is an appropriate one for collective bargaining under the Act. *R.B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966).

In *Specialty Healthcare*, the Board reaffirmed the above community-of-interest test for the petitioned-for unit, but it also noted that the party seeking a larger unit (than that petitioned for) must demonstrate "an overwhelming community of interest" such that there "is no legitimate basis upon which to exclude certain employees" from the unit because the traditional community-of-interest factors "overlap almost completely." 357 NLRB No. 83, slip op. at 11 (*citing Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008).

Here, any overlap that exists between carpenters and tapers is minimal, at best, and insufficient to include tapers within an otherwise appropriate unit of carpenters. While the carpenters occasionally perform some less-skilled taping work, and the tapers

occasionally perform some less-skilled carpentry or laborer work, the record does not support the Employer's contention that all of its field employees are essentially interchangeable. Rather, the record demonstrates that the carpenters spend the vast majority of their time performing carpentry work and other employees only occasionally perform work that may be classified as carpentry.

By the Employer's own account, the amount of time spent performing work of the other craft is minimal. *See, e.g., Hychem Constructors, Inc.*, 169 NLRB 274, 276-7 (1968) (fact that other employees did pipefitters' work did not render separate unit of pipefitters inappropriate, as other employees spent less than half of their time performing less skilled pipefitting jobs); *Charles H. Tompkins, supra* at 196 (fact that other employees performed work similar to that of field engineers did not render separate engineers unit inappropriate, as other employees spent significantly less than half their time performing similar work). Mr. Desmarais could recall very few instances during his career in which carpenters performed taping work. Tr. 186. Mr. Desmarais recalled Mr. Furtado taped "on a couple of jobs for maybe three or four days at a time." Tr. 185. He also recalled another carpenter, Matt Macedo, taped for approximately two nights on one project. Tr. 186.

> Q. In addition to [the two instances involving] Mr. Furtado and Mr. Macedo, are there any other times where you, personally, are aware of carpenters who have done taping work?
>
> A. No.

Tr. 186.

Similarly, the number of instances that Mr. Desmarais could recall tapers performing work outside of their craft – not necessarily carpentry work – was also infrequent.[7]

> Q. Do you have any idea with what frequency [tapers perform carpentry work]?
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> A. It's not something that happens every week. It's just something to keep the taper busy so he doesn't – so we don't lay him off for two days and have to bring him back.
>
> Q. Right. How often in your experience does this occur, if not every week?
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> A. I mean when they had guys on the job, I'd try to keep the taper running all the time. So in the course of a job that probably last three to four months, the taper might either be ***a laborer or a clean-up guy*** maybe three or four days in that three or four month period."

Tr. 175-77 (emphasis added).

Finally, it is also clear here that a lack of work has been a major motivation in having tapers occasionally perform work outside their classification. This does not support the finding of interchange necessary to expand an otherwise appropriate unit for bargaining. *See e.g., Grace Industries, LLC*, 358 NLRB No. 62 (2012) ("although it is clear that asphalt pavers occasionally perform other duties, [the record] suggests that such work was incidental and occasioned by an absence of paving work."); *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1415 (1978) (separate unit of drivers remains appropriate where drivers also worked as laborers "to give them something to do" when there were no driving tasks to perform); *Hydro Constructors, Inc.*, 168 NLRB 105, 105

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[7] The Employer introduced three (3) still photos purportedly showing tapers performing work normally performed by carpenters. Er. Ex. 1-3. Each of the pictures was taken in July, 2014, following the date the petition was filed. Tr. 199. One of the pictures showed an obviously inexperienced craftperson. Er. Ex. 1. The worker had two "snips" in his new tool pouch, and kept the tool pouch on the wrong side of his body. Tr. 139-40.

(1967) (separate units of laborers appropriate even though laborers and drivers sometime perform same tasks because laborers "are engaged a substantial majority of their time in laborers' duties.").

In *Burns & Roe Services Corp., supra*, at 1309, the Board stated:

> The Board has found that a strict separation between crafts is not required in order to find a separate craft unit appropriate. Integration of operations requiring some crossover between craft and noncraft employees, or between employees of different crafts, is permissible.

162 NLRB at 418.

The Board in *E.I. du Pont* further explained:

> ...we find that neither the integrated nature of the production process nor the fact that, in performing many of their functions, the electrical maintenance employees must coordinate their operations with the operations of production employees, constitutes a bar to a finding that the unit sought by Petitioner is appropriate. ...Moreover, although other employee classifications, such as instrument mechanics and oilers, perform some of the less skilled functions of electricians, they do so infrequently, and none exercise all of the electrical skills. Finally, in the performance of their duties, the electricians are required to exercise the usual and recognized skills of craft, and in order to reach full electrician status, employees must progress through the 3-year training program requiring on-the-job training and experience as well as classroom instruction.

E.I. du Pont & Co., 162 NLRB 413, 418 (1966) (integration of operations requiring some crossover between craft and non-craft employees, or between employees of different crafts, is permissible in a craft situation).

In sum, the Hearing Officer's conclusion that the Employer "failed to meet its burden of demonstrating that the tapers have such an overwhelming community of interest with the carpenters that there is no legitimate basis upon which to exclude them", R&R at 8 (¶3), was well-ground in both established Board law and the record. *See, e.g.,*

Burns & Roe, supra ("Any electrical work performed by nonelectrical employees during preventative maintenance is limited primarily to lesser skilled tasks."); *Dick Kelchner Excavating Co.*, supra (finding that operators and laborers constituted separate, appropriate units notwithstanding fact that operators spend a substantial amount of time performing as laborers).

B. The Employer's Exceptions Should Be Dismissed.

Exception No. 1 should be overruled.

The Hearing Officer's finding that "the foreman tells the most experienced taper which areas need to be completed, and that most senior taper will oversee the other tapers on a job" is well-supported by the evidence. Exception No. 1. In short, there is no dispute that the foreman directs the most-senior taper on the job. Employer's Brief in Support of Exceptions at 8; Tr. 188, 246. Moreover, the Employer's road supervisor, Russ Desmarais, unequivocally testified that when there are multiple tapers on a job, one of the tapers will supervise the other tapers. Tr. 219. Accordingly, there is no basis to Exception No. 1

Exception No. 2 should be overruled.

The Hearing Officer's conclusion that "only carpenters cut and install vertical metal studs, install insulation between studs, install 'blocking,' install a vapor barrier, and create 'jigs'" is well-supported by the evidence. Exception No. 2. As discussed more fully above, at Bay State Drywall *carpenters* layout and install the bottom and top track of the exterior walls. Tr. 247. Thereafter, the *carpenters* install the metal studs between the top and bottom tracks and place windows, jambs and sills. Tr. 247. The company's

carpenters also install the exterior sheeting and vapor barriers. Tr. 250. *Tapers are not be involved in the performance of any of the above work*. Tr. 251.

The same is true for the construction of the interior walls. Tr. 251. Indeed, the framing, blocking, framing of the soffits and ceilings, hanging of the drywall, insulation and installation of a second layer of drywall is all performed by the *carpenters*. Tr. 120-21; 251-53. Accordingly, there is no basis for Exception No. 2.

Exception No. 3 should be overruled.

The Hearing Officer's finding that "tapers are sent to the jobsite after carpenters have hung enough sheetrock" is well-supported by the evidence. Exception No. 3. The beginning of every project for Bay State Drywall involves the carpenters, not the tapers, going to the job site to begin work. Tr. 134. Once the wall is constructed (by the carpenters), the tapers are called-in to start their work. Tr. 254. Accordingly, there is no basis for Exception No. 3.

Exceptions Nos. 4 should be overruled.

The Hearing Officer's finding that "carpenters and tapers are not cross-trained" and that "the only evidence that carpenters at Bay State have done taping work are the instances testified to by [Matt] Macedo, Jason Vieira, and Ronald Furtado." Exception No. 4. First and foremost, Mr. Macedo never testified at the hearing. Notwithstanding this point, the record not only demonstrates that carpenters and tapers are not cross-trained, but, as the Employer's own road supervisor candidly acknowledged, "[i]f they're tapers, they're taping." Tr. 213.

From the inception of its employment process, the Employer distinguishes between carpenters and tapers. The Employer has separate postings for carpenters and tapers. Tr. 277-78; Pet. Exh. 8. When the Employer wishes to hire a new carpenter, it publishes a posting which specifically calls for applicants who are interested in being carpenters for the company. When the Employer seeks to hire a new taper, it publishes a posting which specifically asks for applicants who are interested in being tapers for the company. Tr. 198, 277-78. Thereafter, the primary form of training received by the Employer's employees is on-the-job. Tr. 189. New carpenters will work and train with more experienced carpenters. Tr. 189-90. New tapers will work and train with more experienced tapers. Tr. 190. From time to time, specialized training will occur. Tr. 141-142.

Likewise, the evidence adduced during the hearing supports the conclusion that carpenters rarely perform taping work. Mr. Desmarais could recall very few instances during his career in which carpenters performed taping work. Tr. 186. Mr. Desmarais recalled Mr. Furtado taped "on a couple of jobs for maybe three or four days at a time." Tr. 185. He also recalled another carpenter, Matt Macedo, taped for approximately two nights on one project. Tr. 186.

> Q. In addition to [the two instances involving] Mr. Furtado and Mr. Macedo, are there any other times where you, personally, are aware of carpenters who have done taping work?
>
> A. No.

Tr. 186.

Accordingly, there is no basis for Exception No. 4.

Exception No. 5 should be overruled.

The Hearing Officer's "characterization of Russell Desmarais' testimony that the only component of cleaning up a job site is "pushing a broom,' and that tapers only perform less-skilled carpentry work." Exception No. 5. The testimony of the Employer's own road supervisor once again supports the Hearing Officer's findings. Indeed, Mr. Desmarais recalled few instances of tapers performing work outside of their craft – and the examples he did recall consisted of lesser-skilled, laborer work.

> Q. Do you have any idea with what frequency [tapers perform carpentry work]?
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> A. It's not something that happens every week. It's just something to keep the taper busy so he doesn't – so we don't lay him off for two days and have to bring him back.
>
> Q. Right. How often in your experience does this occur, if not every week?
>
> A. I mean when they had guys on the job, I'd try to keep the taper running all the time. So in the course of a job that probably last three to four months, the taper might either be ***a laborer or a clean-up guy*** maybe three or four days in that three or four month period."

Tr. 175-77 (emphasis added).

Finally, it is also worth noting that a major motivation in having tapers occasionally perform work outside their classification was a lack of work. This does not support the finding of interchange necessary to expand an otherwise appropriate unit for bargaining. *See e.g., Grace Industries, LLC*, 358 NLRB No. 62 (2012) ("although it is clear that asphalt pavers occasionally perform other duties, [the record] suggests that such work was incidental and occasioned by an absence of paving work."); *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1415 (1978) (separate unit of drivers remains

appropriate where drivers also worked as laborers "to give them something to do" when there were no driving tasks to perform); *Hydro Constructors, Inc.*, 168 NLRB 105, 105 (1967) (separate units of laborers appropriate even though laborers and drivers sometime perform same tasks because laborers "are engaged a substantial majority of their time in laborers' duties."). Accordingly, there is no basis for Exception No. 5.

Exception No. 6 should be overruled.

The Hearing Officer's "characterization of Desmarais' testimony that William Hayes and Fernando Rodrigues performed work as carpenters' helpers at the 'Pet Smart' job during June and July 2014." Exception No. 6. In support of its claim that Hayes and Rodrigues briefly performed carpentry work, the Employer introduced three (3) still photos purportedly showing tapers performing work normally performed by carpenters. Er. Ex. 1-3. Each of the pictures was taken in July, 2014, *following the date the petition was filed.* Tr. 199. One of the pictures showed an obviously inexperienced craftperson. Er. Ex. 1. The worker had two "snips" in his new tool pouch, and kept the tool pouch on the wrong side of his body. Tr. 139-40.

The finding that Hayes and Rodrigues were merely performing carpenter helper work is not only supported by the photographs of a clearly inexperienced craftperson, but also the repeated testimony of Desmarais acknowledging that tapers, when not performing taping work, performed lesser-skilled facets of the carpentry trade. Tr. 175-177.

Accordingly, there is no basis for Exception No. 6.

Exception No. 7 should be overruled.

The Hearing Officer's finding that "tapers only perform work at a job site 'after carpenters have put up enough drywall to keep the tapers busy,' that carpenters and tapers work separately at job sites, and that only carpenters were given training on the operation of an exterior forklift" is well-supported by the evidence. Exception No. 7. As it relates to the Employer's repeated claims concerning when tapers arrive at the job site, as well as those involving the separation of work between carpenters and tapers on the job site, Petitioner relies on its response to Exception No. 3 above.

Finally, the undisputed evidence demonstrates that the Employer's recently provided lull[8] training was provided to carpenters, not tapers. Tr. 141-42.

Accordingly, there is no basis for Exception No. 7.

Exception No. 8 should be overruled.

The Hearing Officer's conclusion "crediting the testimony of Gary DeCosta that carpenters only perform fire taping occasionally" is well-supported by the evidence. Exception No. 8. Insofar as it relates to DeCosta's testimony concerning his knowledge of (union carpentry) industry practice, the Employer introduced **no evidence** to undermine DeCosta's claims.

Accordingly, there is no basis for Exception No. 8.

Exception No. 9 should be overruled.

The Hearing Officer's conclusion "that tapers do not share an overwhelming community of interest with carpenters, and that their duties and skills are different" is

[8] A "lull" is a machine, similar to a forklift, that can lift heavy materials onto the higher levels of a job. Tr. 141.

well-supported by the evidence and applicable Board law. Exception No. 9. In support of its argument, Petitioner relies on its arguments in Section III.A. and its responses to Exceptions Nos. 4-7 above.

Accordingly, there is no basis for Exception No. 9.

Exception No. 10 should be overruled.

The Hearing Officer's conclusion "that the carpenters and tapers shared duties are 'too minor' to support a finding that an overwhelming community of interest exists" is well-supported by the evidence. Exception No. 10. In support of its argument, Petitioner relies on its arguments in Section III.A. and its responses to Exceptions Nos. 4-7 above.

Accordingly, there is no basis for Exception No. 10.

Exception No. 11 should be overruled.

The Hearing Officer's finding "that there is no evidence of how frequently carpenters perform fire-taping, and that only two (2) carpenters have ever performed taping work that was not fire-taping work" is well-supported by the evidence. Exception No. 11. Absent from the record is any evidence which demonstrates how each craft performed this work. Witnesses for both parties testified to having carpenters and tapers perform the work from time-to-time, based in large part on the minimal skill required. Notwithstanding this fact, the record is clear that the amount of time spent fire-taping is exceedingly small and, as just mentioned, the level of skill required is minimal. Tr. 122-23, 255-56. Finally, whether it the numbers of carpenters that have performed taping work previously is two or three, it is undisputed that the overlap is extremely infrequent. Tr. 186.

Accordingly, there is no basis for Exception No. 11.

Exception No. 12 should be overruled.

The Hearing Officer's "finding and characterization of Desmarais' testimony that tapers are only assigned as carpenters' helpers to perform less-skilled carpentry work when there is a lag in work" is well-supported by the evidence. Exception No. 12. In support of its argument, Petitioner relies on its responses to Exceptions Nos. 3-7 above.

Accordingly, there is no basis for Exception No. 12.

Exception No. 13 should be overruled.

The Hearing Officer's conclusion "that its Daily Working Calendars are not reliable evidence to demonstrate the assignment of carpenters and tapers" is well-reasoned and well-supported by the evidence. Exception No. 13. Within footnote 12 of the R&R, the Hearing Officer states:

> With respect to the frequency with which tapers perform carpentry work, Bay State Drywall asserts that the daily working calendars contain 50 instances in which either no comment appears next to the taper's name, which signifies that the taper did carpentry work, or a comment specifically indicates that a taper did carpentry work. Bay State Drywall did not point out any specific instance in which there was a "carpentry" comment next to a taper's name, and it pointed out only five specific instances in which there was no comment next to a taper's name. I note that, in the case of one of those five examples, there are two versions of the daily working calendar for the H-Mart job for the week ending March 8, 2014, the first of which has no comment next to the name of taper Joe Amaral, and the second of which includes the work "taping" next to Amaral's name in the comment section. *In any event, I decline to rely on the lack of a "taping" comment next to a taper's name in the calendars as reliable evidence that tapers frequently perform carpentry work. The calendars do not indicate the nature of the work performed or*

> *whether the tapers performed carpentry work for the entire period indicated.* ***More important, the lack of a "taping" comment is unreliable evidence in that it conflicts with Desmarais' own testimony that he puts tapers to work as carpenters' helpers only for a couple days if there is a lag in taping work, or three to four days in the course of a three- to-four month job.***

R&R at 9, fn.12 (emphasis added).

In choosing to rely on the testimony of the Employer's road supervisor – as opposed to document rife with confusion – the Hearing Officer accepted the best evidence and came to a reasonable finding. Mr. Desmarais' testimony could not have been plainer. When asked how often did tapers perform carpentry work, he responded:

> I mean when they had guys on the job, I'd try to keep the taper running all the time. So in the course of a job that probably last three to four months, the taper might either be ***a laborer or a clean-up guy*** maybe three or four days in that three or four month period."

Tr. 175-77 (emphasis added).

In addition to clarifying how frequently tapers performed work outside of their craft, Desmarais' testimony also clarified precisely what type of work they were performing. Accordingly, there is no basis for Exception No. 13.

Exception No. 14 should be overruled because the Hearing Officer's conclusion that the undisputed evidence of area practice of separate representation and apprenticeship programs for carpenters and tapers was a relevant consideration weighing in favor of petitioned-for bargaining unit is supported by the law.

"The Board's traditional deference to bargaining history 'is generally applicable in the construction industry,' and bargaining history based on 8(f) agreements may be determinative where only limited evidence concerning community-of-interest factors is

available." *Grace Industries, LLC*, 358 NLRB No. 62, *8 (2012). The record below demonstrates a long history of *separate* bargaining among carpenters and tapers within New England. Tr. 10, 16, 72; Pet. Ex. 1; Joint Ex. 1. Both the Carpenters' Union representative, Mr. DeCosta, and the representative from the Painters' Union, Mr. Hernandez, testified to the clear demarcations that exist within New England involving carpenters and tapers. Id. Both Mr. DeCosta and Mr. Hernandez testified that tapers working in New England have always been represented by the Painters' Union. Tr. 16, 72. They both provided multiple examples of drywall companies within New England that employ carpenters represented by the Carpenters' Union and tapers represented by the Painters' Union. Tr. 55-56, 66-67.

In addition to their long history of representing the interests of tapers throughout New England, the Painters' Union maintains apprenticeship and training classes for tapers through its Finishing Trades Institute. Tr. 17, 20-23; Pet. Ex. 2. As the Carpenters' Union in New England does not represent any tapers, it is not surprising that the Carpenters' training program, the New England Carpenters Training Fund, offers no training classes for tapers. Tr. 72. If the Carpenters' Union represented laid off tapers from Bay State Drywall, it would not be able to send them to any other signatory employers for work. Tr. 70.

Finally, both unions present at the hearing recognized the significant benefits of continuing to have separate unions represent separate crafts. Tr. 86. By maintaining these distinctions, employees are more skilled (and therefore more productive), there is less likelihood of labor disharmony on job sites, and employers are provided with more robust pools of skilled workers. Tr. 31, 86-88.

Accordingly, the Hearing Officer properly considered the lengthy (and separate) bargaining histories of, and training programs for, carpenters and tapers within the New England geographic area as *a factor* in concluding that a unit limited to carpenters was appropriate for bargaining.

Exception No. 15 should be overruled.

The Hearing Officer's conclusion "that operational lines are not a significant factor to be considered, that the proposed unit does not conform to Bay State's departmental lines, and that the nature and amount of carpentry work performed by tapers is insufficient to mandate their inclusion in the petitioned-for unit" is well-supported by the evidence. Exception No. 15. First and foremost, the Hearing Officer never suggested within the R&R that the Employer's "operational lines" were not a significant consideration in her decision. On the contrary, the Employer's own practices and policies reinforced a bright line of demarcation between carpenters and tapers. The record is replete with testimony and other evidence supporting differing treatment between tapers and carpenters when it comes to: hiring (Tr. 198, 277-78; Pet. Ex. 8), training (Tr. 189-90, 141-42), duties and responsibilities (Tr. 121-22, 134, 188, 213, 218, 247, 250-53), supervision (Tr. 219), tools (Tr. 119-21, 126-27, 163-64), compensation (Tr. 195-97; Pet. Ex. 5), and interchange or transition between the two crafts (Tr. 187, 202, 222, 279). In light of these facts, the Employer cannot demonstrate an "overwhelming community of interests" between the tapers and carpenters.

Accordingly, there is no basis for Exception No. 15.

Exception No. 16 should be overruled because the Hearing Officer's conclusion that Alexander Sousa, as the son of a fifty-percent shareholder of the Employer, is not an

"employee" under the Act or otherwise eligible to vote in the election, was correct as a matter of law.

In *Cerni Motor Sales, Inc.*, the employer maintained a closely held family corporation engaged in truck sales and service. 201 NLRB 918 (1973). Company stock was entirely and equally owned by two brothers, John P. and Charles C. Cerni, who, with their wives, constitute the sole officers of Employer. The union disputed the eligibility of five individuals – all of whom were children of Charles C. Cerni, the company president. All of the children lived at their father's home.

The Board in *Cerni* first considered whether the president's children met the status of "employee" under Section 2(3) of the Act. In answering the question in the negative, the Board recognized that Section 2(3) excludes from the definition of "employee" "any individual employed by his parent or spouse." 201 NLRB at 918; 29 U.S.C. 152(3). Consistent with its earlier decision in *Foam Rubber City #2 of Florida, Inc. d/b/a Scandia* ("*Scandia*"), the Board concluded that where the corporation is entirely and equally owned by two shareholders, the situation is comparable to that of a co-partnership. 201 NLRB at 918; *Scandia*, 167 NLRB 623 (1967) (***overruling*** *Adam D. Goettl and Gus Goettl, d/b/a International Metal Products Company*, 107 NLRB 65; *American Steel Buck Corporation*, 107 NLRB 554).

The Board went on to elaborate, "[w]here an individual owns 50 percent or more of a closely held corporation, as in the case of a copartner, that individual is, for the purposes of Section 2(3), the actual employer of the employees." To find otherwise, the Board noted, "would be unrealistic and at odds with the purposes of Section 2(3)."

The Board in *Cerni* nevertheless went on to consider the children of individuals

who own 50 percent or more of the closely held corporation could maintain a similar community of interest with the remainder of the sought-after unit. Once again following the logic previously reached by the Board in *Scandia*, the Board stated,

> 'even assuming, *arguendo*, that Section 2(3) of the Act is not susceptible to the foregoing interpretation, we would, nevertheless, reach the same result in determining the appropriate bargaining unit in accordance with Section 9(b) of the Act.' The Board reasoned that children of principals of closely held corporations, 'because of their relationship with a substantial owner of this type of enterprise, have interests more closely identified with management than with their fellow employees,' and, therefore, would be excluded under Section 9(b) in any case.

Finally, the Board recognized that even if the children's father owned less than 50 percent of the company, it would nonetheless have found "a lack of community of interest with unit employees to warrant their exclusion", due in part to the fact that "all the challenged voters live at home with their parents and are at least partially dependent on them." *Id.* at 918-19. (footnotes omitted).

The facts in this case are almost identical to those in *Cerni*. Here, the Employer is a closely-held corporation owned by two, fifty-percent shareholders, Jose Soares and Manuel A. Sousa. Tr. 113, 225. Manuel Sousa also serves as the president and director of the Employer. Pet. 7. Manny Sousa's son, Alexander Sousa, is employed by the company as a carpenter. Tr. 112. Alexander currently lives with his father and receives free room and board. Tr. 112-13; 280. Additionally, and unlike other carpenters employed by the Employer, Alexander is given access to a company vehicle for work and personal use. Tr. 281.

Based on the foregoing, Alexander Sousa fails to meet the definition of "employee" under the Act and lacks a community of interest with the unit employees. Accordingly, Petitioner's challenge to the ballot of Alexander Sousa should be sustained.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Employer's exceptions be overruled and that a Certification of Representation issue.

Respectfully submitted,

New England Regional Council of Carpenters

By its Attorneys,

/s/ Thomas R. Landry
Thomas R. Landry
Krakow & Souris LLC
225 Friend Street
Boston, Massachusetts 02114
Tel.: (617) 723-8440
tlandry@krakowsouris.com

Certification

I, Thomas R. Landry, certify that a copy of the within Answering Brief was sent, via email, to the below-named attorneys on this 6th day of October, 2014.

/s/ Thomas R. Landry

John D. Doran, Esq.
Littler Mendelson, P.C.
One Financial Plaza, Suite 2205
Providence, Rhode Island 02903
jdoran@littler.com